In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, PETITIONER, *v.* THE TRENTON POTTERIES CO., ET AL. } No. ——

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The United States of America submits its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that Court in the above-entitled cause.

STATEMENT OF THE CASE

On the eighth day of August, 1922, an indictment was filed in the District Court of the United States for the Southern District of New York against The Trenton Potteries Co., Thomas Maddock's Sons Co., and forty-five other defendants, both corporate and individual, for a violation of Section One of the Act of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

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The indictment contained two counts. The first count charged the respondents who, it was alleged, manufacture more than eighty-five per cent of all the sanitary pottery in the United States, with unlawfully engaging in a combination and conspiracy in restraint of interstate trade and commerce in sanitary pottery, and that in pursuance of a common plan and agreement among them so to do they fixed arbitrary and noncompetitive prices for the sale of that commodity. The second count, after reciting the preliminary facts, charged that the respondents, in pursuance of a common plan and agreement, limited and confined their sales to a special group whom the respondents denominated as "legitimate jobbers."

The case was tried before the Honorable William C. Van Fleet, and on the seventeenth day of April, 1923, the jury found a verdict convicting the respondents on both counts. A writ of error was sued out from the Circuit Court of Appeals, which on the sixteenth day of May, 1924, reversed the judgment of the District Court.

The Circuit Court of Appeals in the opening paragraph of its opinion refers to the facts in the case:

> It is not necessary to review the facts at large; sufficient to note that the subject matter of prosecution is a trade agreement to maintain a central bureau of information, disseminate knowledge of prices, customers, discounts, etc., obtained thereby, and *thus persuade or induce the large number of sanitary*

pottery manufacturers who belonged to the Association to conduct their businesses in a reasonably uniform manner as to prices and discounts, and protect the jobbers who contributed their largest normal "outlet."

While differing in detail the scheme condemned in *Eastern, etc., Association* v. *U. S.* 234 U. S. 600 and *American Column, etc.,* v. *U. S.* 257 U. S. 377, may with sufficient accuracy be said to suggest the sort of combination alleged by the Government to have been formed by these defendants.

The Circuit Court of Appeals, however, held that though the jury found that the price-fixing agreement was made, there still remained a question *of fact* for the determination of that jury, *whether such an agreement constitutes an unreasonable or undue restraint of trade.* The Circuit Court of Appeals also held that criminal liability under the Sherman Law is dependent upon proof of injury to the public, and that whether such injury was inflicted was another question of fact that the jury should have been asked to determine. This in effect would substitute the composite opinions of twelve jurymen as to what should be the law of the land for a great statute enacted by Congress.

THE QUESTIONS INVOLVED

(1) *Is it a question of fact for a jury* to determine whether a price-fixing agreement, entered into by a combination controlling more than four-fifths of an industry, and engaged in interstate trade, is an undue restraint of trade? It is manifest that this, the prin-

cipal question in the case, is of great public importance.

(2) The second question is jurisdictional. In a conspiracy case, where jurisdiction is obtained by the recital of overt acts in the indictment, and the defendants at the trial by evidence which they adduce admit the commission of such acts, must the trial court nevertheless charge the jury on that subject?

(3) There are two minor questions involved—(*a*) can witnesses, called on behalf of defendants charged with a violation of the Sherman Antitrust Act, give opinion evidence as to whether the industry was conducted on a competitive basis, and (*b*) was it proper for the Government to inquire into the possible bias of the witness Bantje and the activities of Hanley, the secretary of the jobbers' association?

THE FACTS

The Government at the trial adduced evidence to show (1) that the members of the combination who controlled eighty-two per cent of the sanitary pottery industry in the United States had agreed upon the selling prices for each and every article which they manufactured, and that the prices were fixed to the minutest detail; that (2) in order to sustain the prices fixed by agreement, the respondents further agreed that any sanitary pottery that was discolored or for any other reason might be regarded as a "second" should not be sold in the domestic market; and that as a result of the latter agreement, the respondents limited the supply and were enabled to exact the prices fixed.

Under the second count of the indictment, the Government proved that the respondents by agreement limited their sales to jobbers only; that they further agreed to refrain from selling to any jobber who did not carry a full line of pottery in his warehouse or who sold any other commodity besides sanitary pottery, or who in addition to his jobbing business was a contracting plumber. Those who satisfied the requirements were called "legitimate jobbers"; the others were declared to be "illegitimate."

REASONS FOR GRANTING THE PETITION

The Circuit Court of Appeals held that it was for the jury, *and not for the Court, to determine whether such an agreement constituted an unreasonable or undue restraint of trade.*

The Government believes that it would invoke an immaterial yet extremely speculative element in Sherman Act cases if the reasonableness of the scheme or the benefits to be derived are to be marshaled by a jury in determining its verdict.

The Government under this decision may be placed in the position where it will be constrained to prove excessive prices charged by the respondents, unreasonable profits made by the respondents, and all such similar facts that might appeal to a petty jury as being injurious to the general public.

If the writ of certiorari is not granted, the Government may for a long time be in a position where results in criminal cases brought under the Sherman Law would be dependent on the economic views,

prejudices, speculations, and idiosyncrasies of the various petty juries as to whether a price-fixing agreement entered into by a combination controlling a substantial part of an industry should be deemed to be a reasonable restraint of trade. Unless immediately reviewed, the decision of the Circuit Court of Appeals will thus add to the uncertainty which already exists regarding the application of the Sherman Act.

In the instant case, the failure of this Court to review the legal questions would probably result in a miscarriage of justice; for, on a retrial of the case, the trial judge would necessarily be bound by the erroneous conclusions of the Circuit Court of Appeals, and, in the event of an acquittal, the Government would be without power to correct such a misinterpretation of the statute.

If, on the other hand, the jury should, under the law as thus interpreted, find the defendants guilty, they would be powerless to correct a misinterpretation of the statute for which they were responsible. In neither event would the error of the Circuit Court of Appeals be susceptible of correction by this Court and it would therefore be—at least in the Second Circuit—the law in other cases; and thus the administration of an important statute would be subverted by submitting to the caprice of a jury questions that are essentially legal in character.

Such a construction of the law, which makes a jury and not the Court the final judge as to the prohi-

bitions of the Sherman Anti-trust Law, is in fatal conflict with the law as interpreted in other Circuits from the first enactment of the statute.

We submit that this Court should review the question on certiorari, and thus re-establish the true principle of law, and, at the same time, prevent a miscarriage on a second trial of this case.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

AUGUST, 1924.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, petitioner,
v.
THE TRENTON POTTERIES CO. ET AL. } No. 591

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition in the instant case was filed by the Government on August 15, 1924.

The Government respectfully indicates that in a somewhat similar case, *United States* v. *Gulf Refining Co.*, 262 U. S. 738, a prosecution for a violation of the Elkins Act, this Court granted a writ of certiorari which is now pending.

The record in this case, filed with the Clerk of the Supreme Court, consists of five volumes. The questions raised, however, by the Government's petition, are chiefly questions of law, and this Court will find that it will have to make but few references to the record. The record, therefore, is not as formidable as it looks. The last four volumes chiefly contain price sheets and lists with which this Court will not be concerned.

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ARGUMENT

I

A PRICE-FIXING AGREEMENT ENTERED INTO BY A COMBINATION ENGAGED IN INTERSTATE COMMERCE AND IN CONTROL OF A SUBSTANTIAL PART OF AN INDUSTRY IS ILLEGAL PER SE AND CONSTITUTES AN UNDUE AND UNREASONABLE RESTRAINT UPON INTERSTATE COMMERCE. THE SHERMAN ACT DOES NOT MAKE LIABILITY DEPENDENT UPON THE ECONOMIC VIEWS OF THE JURY AS TO WHETHER SUCH AN AGREEMENT CONSTITUTES AN UNREASONABLE AND UNDUE RESTRAINT ON INTERSTATE TRADE. NOR IS THE JURY CONCERNED WITH WHETHER OR NOT SUCH AN AGREEMENT IS BENEFICIAL TO THE GENERAL PUBLIC.

The trial court held that a price-fixing agreement consummated by a combination of manufacturers controlling more than four-fifths of an industry and engaged in interstate commerce is obnoxious to the Sherman Law, because it vests the combination with arbitrariness of control.

The respondents, on the other hand, contended that price fixing by such a group is of itself not illegal; that there still remained the question of fact for the jury to decide whether price fixing on the part of the combination in this particular industry unreasonably restrained trade and commerce, *and that such determination by the jury would be dependent on proof that the prices charged were unreasonable.*

The Circuit Court of Appeals adopted the respondents' view of the law. It held that even though the jury found that a price-fixing agreement was entered into by the respondents, there, nevertheless, under the *Standard Oil* and *Tobacco cases*

(221 U. S. 1 & 106, respectively), remained the question of fact for the jury to determine whether that constituted a reasonable restraint.

The Government takes the position that a price-fixing agreement entered into by a group of manufacturers who control a substantial part of the industry and who are engaged in interstate commerce is *ipso facto* an undue and unreasonable restraint of interstate commerce and that such an agreement can not be deemed to be a reasonable restraint of trade within the meaning that that language was used by this Court.

The Federal courts have held that price-fixing agreements in their myriad forms are illegal. The law visits its condemnation on the power which such agreements give to the conspirators regardless of whether the power is exercised to enhance prices. (*American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 395, 396, 398; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 323; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293, affirmed 175 U. S. 211; *Jayne* v. *Loder*, 149 Fed. 21.)

The Circuit Court of Appeals also held that the agreement nevertheless may be reasonable within the contemplation of law unless the jury found that the public was injured by such agreement. The Government, on the other hand, maintains that the Sherman Law embodies the presumption that whenever an unreasonable restraint of trade is effected the public is necessarily injured. The Government

further maintains that a price-fixing agreement as to every article of manufacture entered into by a group controlling more than four-fifths of an industry and engaged in interstate commerce effects an undue and unreasonable restraint of trade and that mitigating facts and circumstances can not possibly make such a conspiracy reasonable within the contemplation of the Sherman Act. (*Eastern States Lumber Association* v. *United States*, 234 U. S. 600; *Thomsen* v. *Cayser*, 243 U. S. 66, 84; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 119.)

The respondents, in the brief which they submitted to the Circuit Court of Appeals, relied on those decisions of the lower courts which held the Lever Act to be constitutional. (*C. A. Weed & Co.* v. *Lockwood*, 264 Fed. 453 and 266 Fed. 785.) The Circuit Court of Appeals apparently accepted the reasoning of those decisions—that it is for the jury to determine in each case whether the fixing of prices unreasonably restrained trade and commerce in the particular industry.

According to the Circuit Court of Appeals, therefore, the elementary rule in criminal law that a criminal statute must afford a fixed standard of right and wrong and that criminal liability can not be made dependent upon the variant views of different jurors no longer stands. The Government thought that that point had been definitely settled by the decisions of this Court in the Lever Act cases. (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81.)

The opinion of the Circuit Court of Appeals is in effect a repudiation of the decision of this Court in the case of the *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. This Court indirectly decided the very question presented in the instant case; it declared that a Kentucky statute that made men guess on peril of indictment, whether the activity of their combination enhanced the price, is unconstitutional and that *Nash* v. *United States*, 229 U. S. 373, lent no authority for the enactment of such a statute.

If liability under the Sherman Law is dependent upon the economic views of the various juries, then the decisions of this Court and the lower Federal courts cease to be an aid in determining what is legal and what is in contravention of the Sherman Act. Under a charge in accordance with the views of the Circuit Court of Appeals, the various juries sitting in anti-trust cases of necessity would be constrained to invoke their economic views and determine whether price fixing by a combination controlling a substantial part of an industry and engaged in interstate commerce, should be deemed to be a reasonable restraint of trade.

The Government can imagine no rule of law that would make liability in a criminal case more speculative. The decision of the Circuit Court of Appeals vests the jury with a *force majeur* to override the decisions of this Court. The Circuit Court of Appeals has substituted the variant views of a petit

jury regarding public injury, in place of the act of conspiring to restrain interstate trade, as the essence of the offending.

II

THE RESPONDENTS IN EFFECT ADMITTED AT THE TRIAL THAT THEY COMMITTED OVERT ACTS IN THE SOUTHERN DISTRICT OF NEW YORK. IT WAS THEREFORE UNNECESSARY FOR THE TRIAL COURT TO CHARGE THE JURY ON THAT SUBJECT

The Circuit Court of Appeals held that since the Government obtained jurisdiction in the Southern District of New York by the allegation of overt acts, it was necessary for the Court to charge the jury on that subject. There can be no doubt that ordinarily that rule of law applies.

But in the instant case the officers of the respondent corporations called as witnesses by the Government testified to the commission of overt acts in the Southern District of New York. *Witnesses called by the respondents testified to the same fact.* That aspect of the case never led to an objection or an exception. Though the respondents submitted about sixty proposed charges to the Court covering every aspect of the case, not one of them bore on this subject. Nor did the respondents at the close of the Judge's charge request any instruction concerning this matter.

The respondents did not allege as error before the Circuit Court of Appeals the failure of the trial court to charge on the subject. They merely mentioned it in the closing paragraph of their brief. The reason for this is obvious. As to every error that they did allege, they set forth the page and

folio of their objection and exception. As to every proposed charge which was denied, they set forth the page and folio of the proposed charge. But as to this subject they could not allege that as error since it had never been a subject of disagreement at the trial; they could not possibly refer to the record.

When the trial court charged the jury that the Sherman Act condemns the act of conspiring regardless of whether anything is thereafter done to carry out the agreement, the respondents objected and asked that the converse be charged. The respondents at the argument before the Circuit Court of Appeals extracted that fact from the record, and with that as a basis for the first time maintained that by entering the objection just referred to they in effect had requested a charge on venue. The argument, however, is completely fantastic.

If, under the facts set forth, the jury should have been charged on the subject of venue, then a mere charge that it is imperative that the jury should find that the agreement was carried out would not satisfy a charge on venue. The agreement might have been carried out in the other forty-seven states and not in the State of New York; it might have been carried out in the other forty-seven states and even in every part of the State of New York except in the Southern District.

The Government therefore submits that if it was imperative for the trial court, in view of all the facts set forth, to charge the jury on the subject of venue,

then the converse of the charge given could not be substituted for a charge on the subject of venue.

The Government deems it to be obvious that the argument made by the respondents at the hearing before the Circuit Court of Appeals is without any merit whatever; *that the Circuit Court of Appeals accepted with great seriousness a lawyer argument spun by an afterthought;* and that since the respondents, by evidence which they adduced at the trial, admitted the commission of overt acts in the Southern District of New York, it was absolutely unnecessary for the trial court to charge as to fact which the respondents at the trial admitted.

III

THE COURT EXCLUDED NO COMPETENT EVIDENCE ON THE SUBJECT OF COMPETITION. NO ERROR WAS COMMITTED IN EXCLUDING QUESTIONS CALLING FOR VAGUE, INDEFINITE, AND UNCERTAIN CONCLUSIONS ON MATTERS WHICH WERE NOT THE SUBJECT OF OPINION EVIDENCE

To demolish the weight of the evidence adduced by the Government, the respondents submitted records and testimony of their witnesses to prove that their prices varied.

No objection was interposed by the Government to the introduction of these exhibits or to this testimony. Thereafter the respondents sought to propound questions of the following nature to their various witnesses:

> Can you state whether or not you found yourself in competition with other members of the association at any time?

The Government respectfully submits that uniformity of price is not to be gathered from testimony of witnesses called on behalf of the respondents as to whether they believe that competition existed in this industry.

Before any conclusion fair to either side can be drawn there should be put into evidence facts, and only facts, from which conclusions regarding competition can be made by the jury—not the opinions of the respondents, nor the opinions of jobbers, nor the opinions of the Government witnesses, nor the opinions of the man on the street as to whether or not he believes this to be a competitive industry.

There are numerous decisions of the courts which lay down the rule that a witness can not give opinion evidence on the very points submitted for decision when it is possible to submit facts from which the jury can infer the ultimate fact. *Safety Car Heating & Lighting Co.* v. *Gould Coupler Company*, 239 Fed. 861, 865; *Fred J. Kiesel & Co.* v. *Sun Insurance Office of London*, 88 Fed. 243, 249; *Patten* v. *United States*, 15 (U. S.) Court of Claims 288, 290; *Crane Co.* v. *Columbus Construction Company*, 73 Fed. 984, 989; *Stillwater Turnpike* v. *Coover*, 26 Ohio State 520; *Stirling* v. *Wagner*, 4 Wyo. 5, 42; *M. S. Huey Co.* v. *Rothfeld*, 84 N. Y. Sup. 883.

There is no question in the instant case that the respondents by their witnesses could give instances of purchases made at less than bulletin prices, or that the respondents could have an accountant

examine the records of the company and testify to his findings, or that the respondents had the right to have tabulations prepared to show the percentage of purchases made at nonbulletin prices. The trial court at no time held that the respondents could not by any method of direction or indirection prove that the agreements charged in the indictment were not made.

Objection arose when in addition to all this evidence that the respondents did introduce, they sought to have their witnesses arrogate to themselves the right to determine and declare that this was a competitive industry.

The Circuit Court of Appeals upheld the position taken by the respondents.

The Government, on the other hand, maintains that the trial court committed no error when it held that that question came within the province of the jury, and witnesses could not give opinion evidence regarding the most important and ultimate conclusion of fact.

IV

THE ACTIVITIES OF HANLEY AND THE BIAS OF THE WITNESS BANTJE WERE PROPER SUBJECTS OF INQUIRY. NEITHER THE QUESTIONS NOR THE ANSWERS WERE PREJUDICIAL: THE INCIDENTS WERE NEGLIGIBLE

The special counsel appointed by the Government to investigate the various building combines during the period of the housing shortage found that one Hanley, Secretary of the Eastern Supply Association, was the moving spirit of every combination that they investigated. Whether they examined

the soil pipe industry, the glass industry, the terra-cotta industry, or the sanitary potters' industry, which is the instant case, they found that these various associations would turn to Hanley as their guide.

The Court will recall that in the statement of facts contained in the Petition, the Government asserted that the respondents had agreed that any seconds, that is Class B goods, were to be sold for export only, in order that the prices for Class A goods could be sustained in the domestic market.

In the minutes of the Potters' Association it appears that Hanley sent a letter to the Association to this effect:

> Letter was read from Secretary Hanley of the Greater New York Association of Jobbers, protesting against the sale of Class B ware in New York, and promising their early support of any plan to stop it.

Various letters were also found in the files of the respondent corporations as to inquiries made of Hanley, regarding the subjects which formed the basis for the indictment. Both the portion of the minutes of the Association here referred to and these letters were put into evidence by the Government.

The respondents to disprove the making of such an agreement showed that at a roll call of the Association during the early part of 1921, twenty (20) of the twenty-four (24) respondent corporations reported that they were selling Class B goods in the domestic market.

The Government takes the position that it was thereupon proper for it to adduce proof that the reason why the respondents sold Class B goods in the domestic market in the early part of 1920 was that Hanley just prior to that time was under investigation by the Lockwood Committee, which was the Legislative Committee of the State of New York investigating the housing shortage in the Greater City. In other words, the Government could show that the reason why Class B goods were at that time sold in the domestic market was because Hanley had just been investigated, and that therefore proof that twenty (20) of the twenty-four (24) corporations were selling Class B goods in the domestic market in the early part of 1920 did not avoid the proof adduced by the Government that such an agreement had been made.

The Government submits that the Circuit Court of Appeals therefore erroneously regarded the questions concerning Hanley's investigation to be analogous to questioning a witness as to whether or not he was a friend or an acquaintance of a person who had been indicted or investigated.

In regard to the question propounded to Bantje, which the Circuit Court of Appeals also regarded to be improper, the Government maintains that it is always proper to question a witness as to subjects which may indicate his bias and which at the same time will not either disgrace him or degrade him in the eyes of the jury. Wigmore on Evidence (Ed. 1923), Vol. 2, p. 376 and p. 984.

The witness Bantje was a salaried employee in charge of sales of the Mott Iron Works. The Mott Iron Works was a party defendant and pleaded guilty in the first case which the counsel for the Government in the building investigation had prosecuted. It was proper for the Government to indicate that fact, not as a means to impeach the witness's credibility but in order to show his possible bias against the Government. The Government does not see how disgrace could possibly attend the witness because of the facts here set forth.

JAMES M. BECK,
Solicitor General.

NATHAN PROBST, JR.,
Special Assistant to the Attorney General.

SEPTEMBER, 1924.

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